IN THE SUPREME COURT OF THE UNITED STATES

FOR THE FIFTH CIRCUIT

LOUIS JOHNS	I	
Plaintiff-Appellant	I	FIFTH CIRCUIT NO. 72-2070
VS	I	
JOSEPHINE JONES	I	SUPREME COURT NO. _____
Defendant-Appellee	I	

[redacted] FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF SAID COURT:

Comes now LOUIS JOHNS, Plaintiff-Appellant in the above styled and numbered cause, and files this his application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and as grounds therefore would show this Honorable Court the following:

I

This application arises out of a suit to recover title to land. The land was acquired by LOUIS JOHNS and wife, JOSEPHINE JOHNS, in El Paso County, Texas, prior to their divorce in 1957. After the divorce, (in which each received one-half of the land), LOUIS JOHNS transferred his interest to JOSEPHINE JOHNS, his ex-wife, with instructions that she was to hold the deed until he wanted the land back. Subsequently, in 1972, he prosecuted his suit in the Federal District Court for the Western District of Texas, El Paso Division, to recover his portion of the realty, which his ex-wife refused to reconvey to him, the value of the land having increased in the intervening years from almost nothing to several million dollars. LOUIS JOHNS lost in the trial court and attempted the perfection of his appeal to the Fifth Circuit.

For the reasons set out in the attached opinion by the Fifth Circuit, LOUIS JOHNS was not allowed to file a transcript in that court. MR. JOHNS secured new counsel and applied for a re-hearing. The re-hearing was granted, and MR. JOHNS,

meanwhile having fallen into disagreement with his counsel, then attempted to represent himself. Overruling his motion for re-hearing, the Fifth Circuit again refused to allow MR. JOHNS to file the transcript, entering its order on or about the 17th day of July, A.D., 1972.

The opinion of the Fifth Circuit, hereto attached, is self explanatory.

II

It is urged that this Honorable Court consider the following question:

> Whether the forty (40) day period [redacted]mission of the record, referenced in Rule 11, F.R.C.P., runs from the date of overruling of Appellants Motion to Proceed in forma pauperis.

It appears that if the Fifth Circuit's ruling, expressed in the attached opinion, is to be upheld, the Appellant is placed in a position requiring him to post a bond for costs and order a transcript for which he may not be able to pay. If the Fifth Circuit's construction is upheld, it effectively precludes a pauper from perfecting his appeal, since he must first post a cost bond and then must urge his Motion to Proceed in forma pauperis. The time sequences set out in the Fifth Circuit opinion appear upon the surface to support the Court's statement that a "blatant" non-compliance with the rules exist in this case. However, in all fairness to Appellant, these matters were handled by counsel, and we can assume that he trusted his lawyer's judgement. Appellant subsequently had new counsel who now holds the completed transcript of the hearing on the motion to proceed in forma pauperis and the original trial as security for unpaid attorney's fees, (Appellant being unable to pay such fees). We cannot examine portions of that transcript to indicate what may have been the cause for the apparently senseless failure to follow the rules of Appellate procedure. Additionally, at different times during the process of Appellant's attempt to get his transcript filed in the Fifth Circuit, he has been reduced to representing himself, with all the lack of expertise which that implies.

This Court is urged to consider granting relief to Petitioner and Appellant LOUIS JOHNS, because there is a diversity of opinion on this exact point between the various Circuit Courts of Appeals. It is held that the above referenced forty (40) day period does not begin to run until disposition of a motion to proceed in forma pauperis. Black v. United States, C. A. Cal. 1959, 269 F. 2d 38, certiorari denied 80 S. Ct. 379, 361 U. S. 938 4L. Ed. 2d 357. King v. Laborer's International Union of North America, 443 F. 2d 273 (6th Circuit 1971).

It appears that there is a hiatus in the rules. It is provided, in rule 4 F. R. C. P. that certain motions which are timely filed terminate the running of the time for filing a notice of appeal, for example. It appears that nowhere in the rules is taken into consideration the problem of the Appellant who is not certain of whether he can proceed in forma pauperis. It is possible, for example, to suppose that counsel for Appellant in a given case might advise that the cost of appeal will be four or five thousand dollars. Appellant might not have four or five thousand dollars, although he might have four or five hundred. Based on this advice of counsel he would apply to proceed in forma pauperis, in good faith, and the motion might be denied. In addition, although this writer is unable to examine the record, it being held by prior counsel as security for non-payment of attorney's fees as above set out, the client advises that the record on the motion to proceed in forma pauperis would show that the five thousand ($5,000.00) dollars in cash which the court states he had was in the form of cash values in insurance policies on which he had ceased paying premiums many years ago, and which were in the physical possession of his ex-wife, Defendant and Appellee in this case. Client advises that he was unaware that he had this cash coming to him until it was brought out by testimony from the Appellee on the motion to proceed in forma pauperis.

In summary, at issue in this suit is the ownership of one-half of a tract of land worth approximately three million ($3,000,000.00) dollars. It appears that Appellee has acquired the entire tract, including the Appellant's share, without paying him a cent, and that the law as expressed in the District Court has upheld a forfeiture. The equities of the situation strongly indicate that, this Court having jurisdiction because of a diversity of opinion on the legal questions involved between the Circuit Courts, Appellant should be granted relief and at least not denied, for whatever reason, the opportunity to have the Fifth Circuit rule based upon the record in the trial court and not based upon the attempts of the Appellant, as a layman, to prosecute his own appeal, or based upon his attorney's failure to counsel him properly.

III

Jurisdiction in the District Court was based upon diversity of citizenship. The rules involved are set out in the attached opinion of the Fifth Circuit.

WHEREFORE, PREMISES CONSIDERED, Appellant, LOUIS JOHNS prays this Honorable Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and for such other and further relief to which Plaintiff-Appellant may show himself justly entitled.

RESPECTFULLY SUBMITTED,

MICHAEL R. GIBSON
Attorney for Plaintiff-Appellant
600 Myrtle Street
El Paso, Texas 79901

I certify that I have hand delivered a copy of the foregoing applicatio to counsel for Defendant Appellee CLARK HUGHES, 606 Myrtle, El Paso, Texas, this 5th day of September, A. D., 1972.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2070

LOUIS JOHNS,

Plaintiff - Appellant,

vs.

JOSEPHINE JOHNS,

Defendant - Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before BELL, DYER AND CLARK, Circuit Judges.

BY THE COURT:

Judgment was entered against appellant Johns on December 22, 1971. His motion for new trial or judgment NOV was denied January 17, 1972. Notice of Appeal was filed on January 27, 1972, unaccompanied by a cost bond as required by Rule 7, Federal Rules of Appellate Procedure. Johns filed his motion in the district court to proceed in forma pauperis on February 29, 1972, which was denied on April 4, 1972. His motion to enlarge the time for filing a transcript was denied by this court on May 3, 1972 and by the district court on May 10, 1972.

Appellee Josephine Jones has moved to dismiss the appeal. Appellant Johns opposes the motion on the ground that his motion to proceed in forma pauperis made on February 29, 1972 was timely made and that within 40 days after it was overruled on April 4, 1972, he filed a cost bond, filed the record on appeal and ordered the transcript. This is blatant non-compliance with the rules.

Appellant Johns did nothing from January 27, 1972 (notice of appeal filed) to February 29, 1972 (motion to proceed in forma pauperis), a period of 33 days, although Rule 7 required him to file a cost bond and Rule 10 (b) required him, absent a pauper status, within 10 days to order a transcript from the reporter. We hold that appellant's motion to proceed in forma pauperis was not timely made. Furthermore, the district court's judgment of April 4, 1972 makes an affirmative finding that at the hearing on appellant's motion to proceed in forma pauperis the proof showed that he had in excess of $5,000.00 cash; his attorney admitted in open court that he was not a pauper. Nevertheless, appeallant urges that he is entitled to 40 days from April 4, 1972 (or May 24, 1972) to file a transcript, and then admits that it was not ordered until May 8 and has not yet been filed.

We will not permit a frivolous motion to proceed in forma pauperis to make a farce of the requirements of the Federal Rules of Appellate Procedure. Nor will we ignore orders of this Court and the district court denying an enlargement of time to file a transcript.

The motion of appellee Josephine Johns to dismiss the appeal is granted.